No. 14661

United States
COURT OF APPEALS
for the Ninth Circuit

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

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APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

Sam D. Rawson claims a mining claim upon certain lands belonging to the United States. Pre-Trial Order, R. 5, 6, 10-12. The United States brought this action to declare the mining claim void and to enjoin alleged trespasses on the government land concerned. Pre-Trial Order, R. 9-10. A final judgment declaring the mining claim null and void was rendered by the District Court. R. 50.

The District Court had jurisdiction by virtue of the fact that the United States is the party plaintiff: 28 U.S.C. sec. 1345. Pre-Trial Order, R. 3. This court has jurisdiction of this appeal under 28 U.S.C. sec. 1291.

The appeal involves the construction of, but not the validity of, 30 U.S.C. sec. 22:

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R.S. § 2319; February 25, 1920, ch. 85, § 1, 41 Stat. 437.)"

STATEMENT OF THE CASE

Sam D. Rawson located a mining claim in Jefferson County, Oregon. R. 6. The United States thereafter filed this action in the U. S. District Court for Oregon against him, claiming that his location was null and void and praying that he be enjoined from going on the claim and removing volcanic cinders therefrom, and for judgment for the value of the cinders removed. The action was tried before Solomon, J., who after entering findings of fact and conclusions of law, entered a judgment thereon declaring appellant's mining claim null and void and granting the relief prayed for. Sam D. Rawson appeals from that judgment.

The basic facts in regard to appellant's mining claim are well stated in the agreed facts of the Pre-Trial Order. Appellant's 20-acre claim was located on Round Butte, "a clearly visible mound of volcanic cinders", rising about 600 feet above the surrounding countryside. R. 5.

Paragraph V of the Agreed Facts continues:

> "The cinders of which this mound is composed, consist principally of silicon, aluminum, potassium, sodium, iron, calcium and magnesium. These cinders are commercially valuable for road surfacing, highway construction, building block material and other purposes. The cinders are not rock in place, as a lode, but are in the form of a placer deposit and said deposit of cinders has a commercial value."

There was also uncontradicted evidence at the trial as to the mineral content of these cinders and that they have a commercial value and are salable. R. 66, 63.

It was also an agreed fact as to the twenty acres upon which the claim was located that:

> "a physical examination thereof indicates that said 20-acre tract is not presently and never has been suitable for cultivation or for agricultural purposes and this is apparent because of the steep slope and because of the hard-pan lying just below the surface. Said tract has at all times herein involved been and now is chiefly valuable as mineral land because of the cinder content of said Round Butte." R. 6.

There was also uncontradicted testimony at the trial that this land upon which the claim was filed was known to be mineral before the appellee ever issued any homestead patent thereto. R. 63.

Finally the facts as to the locating of the claim were agreed to:

> "On February 17, 1951, the defendant, Sam D. Rawson, having discovered the mineral deposit of cinders on said 20 acres, posted a notice of location of a 20 acre claim described as the
>
> West Half (W ½) of the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of said Section 13,
>
> containing 20 acres more or less, in compliance with the provisions of the mining laws of the United States (30 U.S.C.A., Sections 21-52).) Said defendant was at said time a citizen of the United States and was over the age of 21 years and was a resident of Jefferson County, Oregon. Said defendant described said claim in said notice as the 'Luck Strike', and thereafter, the defendant filed a copy of said notice in the office of the County Clerk of Jefferson County, Oregon, and the defendant has since been in possession of said placer mining claim and claiming under the mineral laws of the United States. While in possession the defendant has made improvements upon and in connection with said claim of a value in excess of $500.00. While in possession, defendant has been and is presently going upon said lands within said claim and removing cinders therefrom." R. 6-7.

The land on which the said claim was located was purchased by the United States in 1937 with moneys appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. R. 4-5. The land was purchased for the purpose, among others, "of retiring submarginal land from agricultural use." R. 6.

The appellee contended below that appellant's mining claim was null and void simply because it was on "acquired" land, i. e., land which had once been

patented by the United States and afterwards bought back. See particularly appellee's Contentions VI, VII, VIII, and X. R. 10.

The court below agreed and entered two conclusions of law which stated:

"IV

"Such 20-acre tract is not in the public domain but is acquired land not subject to mineral entry.

"V

"Defendant's mining claim is null and void." R. 22.

The entry of those conclusions of law together with the judgment based thereon are the principal errors specified by the appellant. (Specifications of Error I, II and III). Essentially this appeal presents a single issue: was the land in question open to mineral entry in 1951?

The answer to that question depends upon the construction given the mining laws of the United States and to Executive Order No. 7672. The problem involved in the construction of the mining laws and, in particular, the phrase "lands belonging to the United States" found in 30 U.S.C., Sec. 22 pertains to all acquired lands of the United States. The construction to be placed on Executive Order No. 7672 pertains only to a certain area of land in Central Oregon.

SPECIFICATION OF ERRORS

Specification of Error No. I

The District Court erred in entering the Final Judgment and Order of Injunction of December 23, 1954, and in particular in ordering, adjudging and decreeing therein that:

> "Now, Therefore, It Is Ordered, Adjudged and Decreed that the corrected interlocutory judgment and order of injunction made and entered December 28, 1953, as of the 2nd day of January, 1953, concerning defendant's alleged mining claim covering the W ½ of the SW ¼ of the SE ¼ of Section 13, Township 11 South, Range 12 East, of the Willemette Meridian, in Jefferson County, Oregon, be and hereby is reaffirmed and re-entered this 23rd day of December, 1954, and is hereby made final insofar as it provides that the mining claim of the defendant, Sam D. Rawson, heretofore filed of record with the County Clerk of Jefferson County, Oregon, on February 17, 1951, is null and void and no force and effect, and that the defendant, Sam D. Rawson, his servants, employees, agents, contractors and representatives, and all other persons acting by or under his direction or authority or in concert or participation with him, be permanently enjoined and restrained from entering, trespassing, occupying, possessing or removing cinders from the tract of land hereinabove described, and
>
> "It Is Further Ordered, Adjudged and Decreed that the plaintiff have and recover from the defendant the sum of $120.00 damages for the removal of cinders from the land above described prior to the order of injunction herein." R. 50.

in that the land in question was open to mineral entry under the mining laws of the United States and Execu-

tive Order No. 7672 and the appellant has a valid mining claim thereon.

(This specification covers Appeal Points 1, 2, and 3. R. 53, 70).

Specification of Error No. II

The District Court erred in entering Conclusions of Law IV which states totidem verbis:

> "Such 20-acre tract is not in the public domain but is acquired land not subject to mineral entry." R. 22.

in that under the mining laws of the United States and the terms of Executive Order No. 7672, said tract was open to mineral entry though said tract was acquired land.

(This specification covers part of Appeal Point 4. R. 54, 70).

Specification of Error No. III

The District Court erred in entering Conclusion of Law V. which states totidem verbis:

> "Dedendant's mining claim is null and void." R. 22.

in that appellant's claim was valid under the mining laws of the United States and the terms of Executive Order No. 7672, and said conclusion was based on the preceding Conclusion of Law No. IV, wherein it was erroneously concluded that acquired land is not open to mineral entry.

(This specification covers part of Appeal Point 4. R. 54, 70).

Specification of Error No. IV

The District Coure erred in entering Conclusion of Law III which totidem verbis was:

> "The determination made by the land officers of the Department of the Interior on January 25, 1915, at the time it issued a homestead patent containing such tract, that such land was not mineral land is a conclusive determination of such fact insofar as the defendant is concerned." R. 22.

in that there has been no determination made by the land officers of the Department since the land in question was acquired by the United States.

(This specification covers part of Appeal Point 4. R. 54, 70).

Specification of Error No. V

The District Court erred in entering Finding of Fact 7 which states totidem verbis:

> "In June, 1938, pursuant to Executive Order 7908, the lands purchased pursuant to the Emergency Relief Appropriations Act of 1935 were transferred to the Secretary of Agriculture for administration under the Bankhead-Jones Farm Tenant Act." R. 21.

in that there has no evidence received to show any connection between the land involved and Executive Order No. 7908.

(This specification covers part of Appeal Point 4. R. 54, 70).

SUMMARY OF ARGUMENT

The first three specifications of error raise essentially a single question of law: is "acquired" land, in general, and this land, in particular, open to mineral entry under the mining laws of the United States? That is the basic issue on this appeal. Since the first three specifications present essentially a single question, they are argued together.

That argument may be summarized as follows:

A. Executive Order No. 7672 legally describes the land in question and expressly provides that it is open to mineral entry.

B. Executive Order No. 7672 was issued by the President under the authority of the Withdrawal Act and that act required the land withdrawn to remain open to mineral entry.

C. The Attorney General of the United States construes a statutory withdrawal order such as Executive Order No. 7672, as leaving the land open to mineral entry.

D. This case may be decided upon the basis of the construction of Executive Order No. 7672 without deciding the abstract question whether acquired land is always open to mineral entry.

E. Executive Order No. 7672 is the controlling executive order insofar as the land in question is concerned.

F. Congress intended the term "lands belonging to the United States" in the mining laws of the United State to cover "acquired" land.

1. The legislative history of the mining laws and a comparative analysis of other statutes demonstrate that.

2. Congress was aware of the problem of acquired lands when it enacted the mining laws.

3. The case law supports the application of 30 U.S.C., Sec. 22 to acquired lands.

G. Congress has not passed any special legislation withdrawing the land involved here from mineral entry.

H. The court below has read distinctions into 30 U.S.C., Sec. 22 which were not placed there by Congress and in so doing has defeated the liberal purpose of the mining laws.

The argument on Specification of Error IV is briefly that any alleged determination that the land in question was not mineral made prior to acquisition of the land by the United States in 1937 is immaterial here. Specification of Error V specifies as error a finding of the court below upon the ground that there is a total absence of evidence to support it.

ARGUMENT: SPECIFICATIONS OF ERROR I, II AND III

POINT A: Executive Order No. 7672 legally describes the land in question and expressly provides that it is open to mineral entry.

This case is here primarily because the government officials concerned and the court below have disregarded the plain meaning of Executive Order No. 7672 and have read into it subtleties which have no basis in either law or the words of the order.

On July 12, 1937, the land in question was conveyed to the United States. R. 4-5. On July 19, 1937, the President signed Executive Order No. 7672 which reserved and set apart this land, along with many other parcels, for use and development by the Department of Agriculture in connection with the Central Oregon Land Project, LA-OR2. This order has never been revoked and the land in question here is still in the Central Oregon Land Project.

The text of the order is important and it is set out here in full, omitting only legal descriptions of land in other townships:

"Executive Order
"Withdrawal of Public Lands for the Use of the Department of Agriculture
"Oregon

"By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, it is ordered as follows:

"Section 1. Executive Order No. 6910 of November 26, 1934, as amended, temporarily with-

drawing certain lands for classification and other purposes, is hereby revoked so far as it affects any public lands within the following-described area in Oregon:

"Willamette Meridian

" * * * (other townships omitted)

"T. 11 S. R. 12 E.

sec. 11, SE ¼ SE ¼;
sec. 12, SW ¼ NE¼, S ½ SW ¼, and SE ¼;
sec. 13, all; (Emphasis supplied)
sec. 14, E ½;
sec. 22, lots 1, 2, 3, and 4, NE ¼ SE ¼, and S ½ SE ¼;
secs. 23, 24, 25, and 26;
sec. 27, lots 1, 2, 3, 4, and 5, W ½ NE ¼, NE ¼ NW ¼, S ½ NW ¼, SW ¼, and W ½ SE ¼;
sec. 28, lots 1, 2, 3, and 4, S ½ SW ¼, and SE ¼;
sec. 29, lots 1, 2, 3, and 4;
sec. 30, lots 1, 2, 3, 4, 5, and 12, SE ¼ SW ¼, and SW ¼ SE ¼;
secs. 31, 32, 33, and 34;
sec. 35, N ½, SW ¼ and NW ¼ SE ¼;
sec. 36, N½ N½ and SE ¼ NE ¼;

" * * * (other townships omitted)

"Section 2. Subject to the conditions expressed in the above-mentioned acts and to all valid existing rights, all vacant, unappropriated, and unreserved public lands within the above-described area are hereby temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws.

"Section 3. This order shall be applicable to all land within the area described in Section 1 hereof upon the cancellation, termination, or release of prior entries, selections, rights, appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly other wise provided in the order of revocation.

"Section 4. The reservation made by Section 2 of this order shall remain in force until revoked by the President or by act of Congress.

"Franklin D. Roosevelt

"The White House
July 19, 1937"

"[No. 7672]"

"[F. R. Doc. 37-2273; Filed, July 20, 1937; 2:50 p. m.]"

During the depression years the United States bought much submarginal land. It was an agreed fact as to the land involved here:

"The funds by which this purchase was made were a portion of the moneys appropriated by the Emergency Relief Appropriations Act of 1935. (49 Stat. 115)" Tr. 5.

Millions of dollars were so spent. 49 Stat. 115.

By 1937 the United States had acquired a great deal of land and the President then issued Executive Order No. 7672 dealing with the lands in Oregon, one of a series for the western states. Section 1 thereof revoked Executive Order No. 6910 "so far as it affects any *public lands* within the following described area in Oregon: "Willamette Meridian * * * T. 11 S., R. 12 E., * * * sec 13, *all;* * * * " (emphasis supplied). The land in question was in section 13, and it was admitted in writing by the Manager of the United States Land Of-

fice in Portland, Oregon, that all land in this section had been patented by 1937. R. 32, 45.

It seems clear that when Executive Order No. 7672, refers to *"public lands* within the following-described area in Oregon" the President meant to include in that phrase lands acquired by the United States under this submarginal land program. (Emphasis supplied). The reason being simply that "all" of section 13 is expressly described therein and there was nothing but acquired land in that section when the Executive Order was issued.

After having listed the land involved hereby its legal description in section 1 of Order No. 7672, the President then provided in section 2 that:

> "All vacant, unappropriated, and unreserved *public land within the above-described area* are temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: * * *." (Emphasis supplied).

The adjectives "vacant, unappropriated and unreserved" do not change the meaning of section 2 so far as it applies to the land here in question.

The land in question was, after its purchase, "vacant, unappropriated, and unreserved public land"; the United States had had title only seven days when the Executive Order was issued. R. 4. The adjectives "vacant, unappropriated and unreserved" have a definite technical meaning: land which has not been appropriated or

reserved by a private citizen. See 43 Words & Phrases, Perm. Ed., "vacant public land", p. 635; unappropriated public lands", p. 29, Supp. p. 12; "unreserved", p. 383.

This phrase is to be read together with section 3 of Executive Order No. 7672:

> "This order shall be applicable to *all lands within the area described in Section 1 hereof upon the* cancellation, termination, or release of prior entires, selections, rights appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly otherwise provided in the order of revocation." (Emphasis supplied).

When section 2 is read with section 3, it is clear that by section 2 the President was blanketing into the land project immediately all land upon which a private citizen had not begun the process of appropriation or reservation. By section 3 he provided that, if this process of appropriation was not completed, then at that time of cancellation the land concerned should also come into the project.

The completion of the process of appropriation and reservation by a private citizen of public land may take some time to perfect and it may fail altogether after the initial steps are taken. Consequently, section 3 of the order quite properly provides that if any appropriation of land fails, that land is also to be governed by the order.

This also explains the difference in phraseology between section 1 and section 2. Section 1 covers "any public lands", i.e., all publically owned land in those listed sections, irrespective of whether or not appro-

priation or reservation has been started thereon by a private person. Section 2 adds the adjectives "vacant, unappropriated, and unreserved" to "public lands within the above-described area" to make it absolutely clear that land upon which appropriation by a private citizen has started is not to be blanketed into the project. In short, government ownership is not to override the fact that there may have been a partial appropriation which may result in the government granting a homestead or a mineral entry.

Finally we come to the core of the order from the viewpoint of this case. Section 2, setting up the withdrawal from entry, is qualified by an express proviso which reads as follows:

> "Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws."

The appellant made a mineral entry in reliance upon that language and the mining laws of the United States. Confining our attention to the executive order, it is clear that the President regarded the land which had just been acquired by the United States as "public lands".

Nothing in the order supports assumption of the court below that the term "public lands" in the order is restricted to lands which had never been patented as distinct from submarginal land which had been reacquired by the United States. R. 18, 22. In fact the evidence to the contrary is decisive: the President lists by legal description of "all" of section 13 in the order at a time when section 13 contained no unpatented land.

POINT B: Executive Order No. 7672 was issued by the President under the authority of the Withdrawal Act and that act required the land withdrawn to remain open to mineral entry.

The President did not inadvertently insert in Executive Order No. 7672 the carefully worded proviso expressly continuing the right of mineral entry upon the withdrawn lands; he was required to do so by the express command of Congress.

The preamble to the order recites:

> "By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat 497, it is ordered as follows: * * * "

The statutes referred to in the Executive Order are popularly referred to as the Pickett or Withdrawal Act and are now codified as 43 U.S.C., secs. 141 and 142:

> "Sec. 141. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, ch. 421, § 1, 36 Stat. 847.)
>
> "Sec. 142. *All* lands withdrawn under the provisions of this and the preceding section shall at *all* times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to metalliferous minerals: * * *" (Emphasis supplied).

It is difficult to conceive how Congress could have used more forceful or precise language to state that: if

the President withdraws land under these sections it remains open to mineral entry. The cinders involved here are metalliferous minerals. R. 5. The phrase "metalliferous minerals" was inserted in the law in 1912 in place of the phrase "minerals other than coal, oil, gas and phosphates". 43 U.S.C.A., sec. 142 historical note.

Not only did the President insert in his order the proviso keeping the land open to mineral development, as required by 43 U.S.C., sec. 142, but he was alse careful to state in section 2 that the withdrawal was "subject to the conditions expressed in the above-mentioned acts". The above-mentioned acts are, of course, none other than the act of June 25, 1910, ch 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, which are stated in the preamble to the order and are now codified as 43 U.S.C., sections 141 and 142.

Giving Executive Order No. 7672 its natural meaning requires a conclusion that the land here involved was open to mineral entry. In *Mason v. United States,* 260 U.S. 545, 43 S. Ct. 200, 67 L. ed. 396, the Supreme Court had occasion to construe an executive order withdrawing certain public lands and the court held that the primary rules to be followed were "that effect should be given to every part of a statute, if legitimately possible, and that words of a statute or *other document* are to be taken according to their natural meaning." p. 554. (Emphasis supplied)

If Executive Order No. 7672 is given its natural meaning, this case presents no particular difficulty. The

government officials concerned and the court below have read into Executive Order No. 7672 distinctions which the President neither had in mind or stated. This is especially evident when it is remembered that this was a statutory withdrawal under 43 U.S.C., section 141 and 142, popularly known as the Withdrawal or Pickett Act.

PRESIDENT HAS INHERENT POWER TO WITHDRAW LAND FROM ENTRY BUT HERE HE ACTED UNDER HIS STATUTORY POWERS

The President has inherent power to withdraw public land in addition to the statutory powers conferred on him by the Withdrawal Act. *United States v. Midwest Oil Company,* 236 U.S. 459, 59 L. ed. 673, 35 Sup. Ct. 309; *Sioux Tribe v. United States,* 316 U.S. 317, 325, 86 L. ed. 1501, 63 Sup. Ct. 1095.

While the President has the inherent power of withdrawing public lands without statutory authority, the President here chose to act under his statutory powers and hence subject to his statutory disabilities. The statute clearly provides that rights of mineral entry are not affected by a statutory withdrawal thereunder. Executive Order No. 7672 was issued under this statutory power of the President. The conclusion seems irresistible that the right of mineral entry was to continue here.

POINT C: The Attorney General of the United States construes a statutory withdrawal order such as Execuive Order No. 7672, as leaving the land open to mineral entry.

In taking the position that the right of mineral entry does not continue under Executive Order No. 7672, the court rejected on opinion of the Attorney General of the United States as to the effect of such an order. 40 Op. A.G. 73. While an opinion of the Attorney General was not binding upon the court below, nevertheless in a matter of this nature it should have considerable weight. It is the opinion of the chief legal officer of the United States as to what the chief executive officer of the United States was trying to accomplish by choosing the form of withdrawal order he did.

The Secretary of the Interior had requested an opinion on a proposed executive order entitled "Withdrawal of Public Lands for Use in Connection with the Squaw Butte Experimental Station-Oregon". In that case the Secretary wanted to know if the proposed order removed the lands involved from mineral entry. As Attorney General Jackson, later Mr. Justice Jackson, put it:

> "The purpose of the proposed order is so to withdraw and reserve the lands that they will not be subject to such mining law." p. 74.

The proposed order did not rely upon the Withdrawal Act, but upon the general authority of the President:

> "In submitting the order you rely upon no express statutory authority for its execution but upon the general authority of the President to withdraw land for public use freed of the operation of the mining

laws, notwithstanding the provisions of the act of June 25, 1910, c. 421, 36 Stat. 847 (U.S.C., title 43, secs. 141-3), as amended by the act of August 24, 1912, c. 369, 37 Stat. 497." p. 74.

The Attorney General analyzed at great length the legislative history of the Withdrawal Act. The Attorney General also analyzed the administrative practice of the government on land withdrawals. He concluded that there is a two-fold plan as to withdrawals: temporary withdrawals under the Withdrawal Act which are subject to mineral entries; and withdrawals under the general authority of the President are not.

The opinion sums this up in the following manner:

"When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mineral laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply." 40 Op. A.G. 73, 81.

Consequently, the Attorney General advised the Secretary of the Interior that since the proposed order was not based upon the statutory authority given by the Withdrawal Act, the land withdrawn would not be subject to mineral entry.

Here we have the converse case. Executive Order No. 7672 is explicitly stated to be a temporary withdrawal "by virtue of and pursuant to the authority vested in me" by the Withdrawal Act. The President even added an explicit proviso in the order that mineral

entry should continue. As the Attorney General states:

> "The status of lands which would be temporarily withdrawn after the act of 1910 for purposes coming within its provisions was fixed by the terms of that act, which made the mining laws applicable." 40 Op. A.G. 73, 80-81.

Finally, the Attorney General's analysis of the general administrative practice of the government should have been persuasive. He points out that the President claims to act under his general powers in making "permanent withdrawals for authorized public uses such as military reservations, light-houses, post offices, or the like" while the statutory withdrawals relate to conservation matters. 40 Op. A.G. 73, 80. This two-fold system leaves to the President the question whether or not land withdrawn should be open to mineral entry or not. If it is to be open, he acts under his statutory powers as he did here.

Indeed, this case would not have arisen if the officials concerned had been willing to give proper weight to the Attorney General's opinion as to the effect of the form of Executive Order No. 7672.

POINT D: This case may be decided upon the basis of the construction of Executive Order No. 7672 without deciding the abstract question whether acquired land is always open to mineral entry.

There is a vast amount of government land in this country other than the land which has never been patented. The President, as the chief executive officer of the government, can act swiftly and directly to withdraw land for special purposes by issuing appropriate executive orders. The problem of mineral entry ought not to be decided on the irrelevant basis of whether or not the public land in question has always been owned by the United States or has been acquired after a period in private ownership.

The problem of mineral entry on land owned by the United States ought to be solved by construing those executive orders, rather than, as the court below did, laying down an abstract and theoretical principle that land purchased by the government is not public land. In short, there is no need to decide such a sweeping question with an infinite variety of ramifications which can arise out of the various kinds of government land from customs houses to guided missile ranges. Probably one result of so deciding will be to develop a complex case law that says while "acquired land" is not "public land" for mineral entry, the various statutes and case law principles covering such matters as trespass and local tax paying must be applied to "acquired land" as if it were "public land".

The proper judicial function here is to construe the words which have been used by the President as the

chief executive, and then each case may be decided with the over-all policy of the government, as embodied in the executive orders relating to hundreds of types of land uses by the government. If the President wishes the rights of mineral entry to continue in land, he acts under his statutory powers, as he did here. If he simply wants them for some traditional use such as a light-house site, he can withdraw the land under his traditional inherent powers without any proviso that the land be subject to mineral entry. It is submitted that this is the easy way to handle the great variety of land problems which arise.

Here the President acted wisely in keeping open the arid, largely worthless land in the Central Oregon Land Project to mineral entry. Conservation is wise use to develop the full potential of the land, not arbitrary restrictions. The President has decided that this land should be subject to mineral entry and the court below failed to carry out his considered judgment as stated in Executive Order No. 7672.

POINT E: Executive Order No. 7672 is the controlling executive order insofar as the land in question is concerned.

The land in question here was purchased July 12, 1937. R. 4. It was an agreed fact that:

> "The funds by which this purchase was made were a portion of the moneys appropriated by the Emergency Relief Appropriations Act of 1935. (49 Stat. 115)." R. 5.

On July 19, 1937, the President issued Executive Order No. 7672. It was an agreed fact that:

> "The President had authority under the Emergency Relief Appropriations Act of 1935 and under the act of August 24, 1935 (49 Stat. 115) to make disposition of all of said lands, including said Section 13 as was made by said Executive Order." R. 9.

On July 22, 1937, Congress passed the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 7 U.S.C., sec 1001 et seq. The court below found that the land in question was "transferred to the Secretary of Agriculture for administration under the Bankhead-Jones Tenant Act" by Executive Order No. 7908. R. 21. This finding is elsewhere in this brief specified as error.

But assuming for the moment that finding is correct, the most that can be said for Executive Order No. 7908 is that it transfers the administration of land to the Secretary of Agriculture and it does not affect appellant's mineral claim. The administering agency is an irrelevant factor: at the time of trial the Department of Agriculture did not have jurisdiction over these mineral deposits. It was stipulated in the Pre-Trial Order:

> "It is stipulated that under reorganization plan No. 3 of 1946 (5 U.S.C.A. cumulative 106) jurisdiction over mineral deposits on land held by the Department of Agriculture, acquired in connection with the efforts of the Government to retire submarginal lands, has been transferred to the Department of the Interior."

An inspection of Executive Order No. 7908 shows that it did not revoke Executive Order No. 7672. Repeals by implication are not favored and it is apparently the universal practice with executive orders that any earlier orders revoked are specifically listed in the revoking order. For example, section 1 of Executive Order No. 7672 revoked Executive Order No. 6910 in part.

The reason for this rule seems to be administrative convenience; otherwise it would be difficult to know which orders of the vast mass of executive orders are actually in force. The clinching argument against any implied repeal here is that there is no other order placing the land listed in Executive Order No. 7672 in the Central Oregon Land Project. Yet it has been the appellee's consistent position that the land involved here is in that project.

Executive Order No. 7672 expressly provides:

> "The reservation made by Section 2 of this order shall remain in force until revoked by the President or by act of Congress."

Here no executive order or act of Congress has modified Executive Order No. 7672.

When Congress deals with entry rights on government land it does so in a forthright and unmistakable

manner. For example, the Act of March 3, 1927, c. 318, 44 Stat. 1359 provides:

> "All public lands of the United States within the boundaries hereinafter described are hereby withdrawn from settlement, location, sale and entry under the public land laws of the United States for recreational purpose, * * *. The lands herein referred to are located in the State of California."

Since Executive Order No. 7672 has never been revoked, any subsequent changes in the agency administering the land cannot affect the right of mineral entry in the lands described in Executive Order No. 7672. On those lands, the President has spoken and has stated as clearly as language can:

> "Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of the lands under the applicable laws."

This proviso has never been revoked and hence remains in full force and effect.

POINT F: Congress intended the term "lands belonging to the United States" in the mining laws of the United States to cover "acquired" land.

30 U.S.C., sec. 22, is entitled "Lands open to purchase by citizens", and is particularly in point:

> "Except as otherwise provided all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under the regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R.S. 2319; Feb. 25, 1920, ch. 85, § 1, 41 Stat. 437.)"

The controlling question is: what did Congress mean when it used the phrase "lands belonging to the United States"? Or more particularly: did Congress intend by this phrase to cover vacant land which is "chiefly valuable as mineral land" where this land had once been conveyed by the United States and afterwards reacquired?

The court concluded as a matter of law:

> "Such 20-acre tract is not in the *public domain* but is *acquired land* not subject to mineral entry." R. 22 (emphasis supplied).

It is apparent that the court below used the vague term "public domain" in a special restricted sense of public land which had never been patented.

30 U.S.C., sec. 22, does not say unpatented public lands; it says "lands belonging to the United States". There is no basis for the distinction the court below drew between "acquired" lands and unpatented public lands so far as the mining laws of the United States are concerned. Congress has made no such distinction.

In fact, Congress discarded the phrase "public domain" lands in favor of the more specific phrase "lands belonging to the United States". Except for the introductory phrase, "except as otherwise provided", the text of 30 U.S.C. sec. 22 comes directly from the basic mining law: the Act of May 10, 1872, c. 152, sec. 1, 17 Stat. 91. The Act of May 10, 1872, was preceded by the Act of July 26, 1866, c. 262, sec. 1, 14 Stat. 251.

Section 1 of the Act of 1866 is closely similar in wording to section 1 of the Act of 1872 and hence to 30 U.S.C. sec. 22. There is one significant change, however: the Act of 1866 used the phrase:

> "the mineral lands of the public domain * * *."

In 1872 this phrase was discarded and replaced with:

> "all valuable mineral deposits in lands belonging to the United States * * *."

In short, Congress, when it came to revise the unsatisfactory Act of 1866, dropped the reference to "lands of the public domain" and replaced it with the more technically precise phrase "lands belonging to the United States". The legislative history of 30 U.S.C. sec. 22 thus makes it clear that the phrase "lands belonging to the United States" does not refer simply to

unpatented land, as the court below assumed. Conclusion of Law IV, R. 22.

Congress, itself, has given 30 U.S.C. sec. 22 the construction which includes acquired land under it. In 1916 Congress desired to obtain a section of land owned by the State of Dakota. Congress felt it necessary to provide that the section thereby obtained from the State of North Dakota:

> "shall not be subject to settlement, location, entry, or selection under the public-land laws, but shall be reserved for the use of the Department of Agriculture in carrying on experiments in dry-land agriculture at the Northern Great Plains Field Station, Mandan, North Dakota." 39 Stat. 344, 43 U.S.C. sec. 153.

ACQUIRED LANDS ARE AN OLD PROBLEM

Actually, the problem of acquired lands is an old one. Legislation of Congress dealing with land titles of the land acquired from Mexico by the Mexican War shows that Congress was aware of the existence of acquired lands prior to 1872. The history of that situation in California is summarized in *Botiller v. Dominguez,* 130 U.S. 238, 32 L. Ed. 925, 9 Sup. Ct. 525. Reference is also made in the opinion of numerous other acquisitions of land and Congressional action in connection therewith (p. 251).

All existing land claims which arose under the Mexican occupation in California had to be submitted to a board of commissioners within certain time limits; otherwise the land should "be deemed, held and considered as part of the public domain of the United

States." Act of March 3, 1851, 9 Stat. 631, 633. Thus, if the claim was not presented, no matter how good the Mexican title of the private owner, the land would become part of the public domain, i.e., publically owned. Land which was not presented to the board thus was "acquired" by the United States, not by war, but by statutory expropriation, which would not be greatly different from the way the United States acquires property now from its citizens, except that compensation is now paid.

THE CASE LAW SUPPORTS THE APPLICATION OF 30 U.S.C. SEC 22 TO ACQUIRED LANDS

Not only is the problem of acquired land an old one, but the case law supports the proposition that the phrase "lands belonging to the United States" includes acquired lands. During the Civil War, Congress passed a virtually confiscatory tax law as to the southern states. The Act of June 7, 1862 is entitled "An Act for the Collection of direct Taxes within Insurrectionary Districts within the United States, and for other purposes." 12 Stat. 422. Essentially it provided that if direct taxes were not peaceably collected in any state "by reason of insurrection or rebellion" the direct taxes due were to be apportioned against the owners of real property in rebellious districts. If the apportioned tax was not paid, title to the land forfeited to the United States. Act of June 7, 1862, 12 Stat. 422, 423.

Verdier v. Railroad Company, 15 South Carolina 476, arose as a result of the United States having acquired land in 1863 under the provisions of the Act of

June 7, 1862 (p. 478). The land had previously been privately owned. *Verdier,* p. 478.

In 1866 in section 9 of the basic mining act heretofore referred to, Act of July 26, 1866, 14 Stat. 251, Congress provided that:

> "the right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." 14 Stat. 253, U.S. Rev. Stat., p. 456, sec. 2477.

In the *Verdier* case, the railroad entered the land in 1870 and claimed under section 9 of the Act of 1866. The court held the railroad's title was good as against another who also claimed through the United States by a deed given in 1876. The court held that the land which the United States had acquired by the operation of the Civil War direct tax laws was "public land" granted under the Act of 1866, saying:

> "It is true that these lands, having been previously granted and owned as private property, were not original public lands like those unsettled in the new states and territories, but we suppose that after the United States acquired the title they were held for the benefit of all the citizens of the government and were 'public lands' in the sense of the Act of Congress." (p. 480).

There must have been hundreds of such tracts of acquired land since it is extremely doubtful if the federal direct taxes were being collected in the states of the Confederacy during the Civil War. "Acquired" land is no new problem and Congress was aware of its existence when it passed the Act of May 10, 1872, 17 Stat. 91.

Murphy v. State, 65 Ariz. 338, 181 P. 2d 336, provides an analogy to the case at bar. The court held that the terms "state lands" or "public lands" within the meaning of the Arizona Constitution included land acquired by the State by the process of mortgage foreclosure.

The court below refused to follow *Verdier v. Railroad Company,* 15 South Carolina 476. Instead it relied upon *United States v. Holliday,* 24 F. Supp. 112. But that case does not involve any statutory right to acquire title from the United States; it only involved "the implied license to graze over unenclosed public lands that has existed for so many years." p. 114. It simply held that the United States had a right to enjoin a continuing trespass by a sheep rancher upon some grazing land which had been newly reseeded by the United States with Crested Wheat grass to restore the range. Here the question is the construction of the mining laws of the United States and the effect of Executive Order No. 7672. Neither question was present in the Holliday case.

In the court below, the appellee repeatedly cited *Oklahoma v. Texas,* 258 U.S. 574, 66 L. Ed. 771, 42 Sup. Ct. 406. Unlike the Holliday case, the Oklahoma case does deal with the mining laws of the United States, but it is not in point here since it does not deal with "acquired" lands but with lands which the United States had never granted to anyone.

The appellee, however, has repeatedly quoted from that case the following dicta with reference to 30 U.S.C. sec. 22:

> "This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of the 'The Public Lands.' To be rightly understood, it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington, or to the lands in the National Cemetery at Arlington, no matter what the mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western states. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws."

The basic question presented to the court was the ownership to the bed of Red River, all of which was in Oklahoma. The court held that the United States had retained title to the south half of the bed of the river and had never granted it to anyone (pp. 575-6).

The court then proceeded to the question of whether placer mining locations were validly made in the south half of the river bed (pp. 599-602). The court held they were not. The court reached that result by considering a whole series of Congressional acts dealing with Oklahoma, which made it clear that Oklahoma, Indian Territory, was a special case to which Congress did not desire 30 U.S.C. sec. 22 to apply.

It is only necessary to mention two of these acts: (1) in 1890 Congress provided that "lands in that territory should be disposed of under the homestead and townsite laws 'only' "; and (2) in 1891 Congress further provided " 'all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their nonmineral character shall not be required as a condition precedent to final entry.' " (p. 600).

In the case at bar there is no such pattern of special legislation dealing with disposal of the land in question, making it clear that the general mining laws are not to apply here. Here Congress has not passed any special legislation excluding the land from the operation of the mining laws of the United States.

The land was acquired with "moneys appropriated by the Emergency Relief Appropriations Act of 1935 (49 Stat. 115)". R. 5. This act is simply an appropriation act and set up no policy as to mineral entry on the land acquired. This was left to the President who acted by issuing Executive Order No. 7672.

Here the general mining law should apply since Congress has not provided to the contrary. The Supreme Court has stated the rule as follows:

> "Public lands belonging to the United States for whose sale or other disposition Congress has made provision by its general laws are to be legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either express or implied." *Lockhart v. Johnson,* 181 U.S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. Ed. 979.

POINT G: Congress has not passed any special legislation withdrawing the land involved here from mineral entry.

Here there is no special legislation applying to the land involved here. It is true that Congress in 1947 passed an Act entitled "Lease of Mineral Deposits Within Acquired Lands", 61 Stat. 914, 30 U.S.C. sec. 351 et seq. However, an examination of section 352 shows that its operation is restricted to the following minerals: "All deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulphur, * * *."

For a long time Congress has treated this specialized group of minerals separately. The extraction problems and hence the legal problems of this special group of minerals differ from those of ordinary metalliferous minerals. Consequently, in 1920 Congress passed what is popularly known as the Federal Leasing Act: Act of February 25, 1920, 41 Stat. 437. This law enacted "that deposits of coal, phosphate, sodium, oil, oil shale, or gas", should be "subject to disposition only in the form and manner provided by this Act." 41 Stat. 437, 451.

In recognition of this fundamental change as to these specialized minerals, the compilers of the United States Code inserted the introductory words "except as otherwise provided" in 30 U.S.C. sec. 22 so that now reads:

> "Except as otherwise provided, all valuable mineral deposits" etc.

instead of

> "All valuable mineral deposits", etc.

Explanatory note, 30 F.C.A. sec. 22.

The 1947 act recognized existing leases on acquired lands as to these specialized minerals. 30 U.S.C. sec. 358 provides:

> "Nothing in this chapter shall affect any rights acquired by any lessee of lands subject to this Act under the law as it existed prior to the August 7, 1947, and such rights shall be governed by the law in effect at the time of their acquisition; but any person qualified to hold a lease who, on August 7, 1947, had pending an application for an oil and gas lease for any lands subject to this chapter which on the date the application was filed was not situated within the known geologic structure of a producing oil or gas field, shall have a preference right over others to a lease of such lands without competitive bidding. Any person holding a lease on lands subject hereto, which lease was issued prior to August 7, 1947, shall be entitled to exchange such lease for a new lease issued under the provisions of this chapter, at any time prior to the expiration of such existing lease. (Aug. 7, 1947, c. 513, § 9, 61 Stat. 915.)"

The main purpose of the 1947 act appears to have been to centralize administration of leasing of acquired lands in the Department of the Interior. This appears from the explanation of the bill given by the House Committee on Public Lands:

> "The purpose of this bill is to promote and encourage the development of the ore, gas, and other minerals on the acquired lands of the United States *on a uniform basis under the jurisdiction of the Department of the Interior.*"
>
> * * * *
>
> "In the interest of economy, the bill eliminates several agencies *now engaged in leasing acquired lands for oil and gas,* and centralizes this function in the Department of the Interior." U.S. Code Congressional Service, 80th Congress, 1st Session 1947, p. 1662. (Emphasis supplied).

POINT H: The court below has read distinctions into 30 U.S.C., sec. 22, which were not placed there by Congress and in so doing has defeated the liberal purpose of the mining laws.

It has previously been argued in detail that the mining laws of the United States are applicable here. Congress' use of the term "lands belonging to the United States" is a precise technical phrase which does not include any distinction between lands never patented and lands acquired after patenting.

Appellant contends that the phrase covers "acquired" land. The government officials concerned and the court below have sought to read into the mining laws of the United States the words "lands never patented" where Congress uses the words "lands belonging to the United States". But in 1872, when the mining laws were enacted, Congress rejected the loose phrase "public domain" and instead used the precise phrase "lands belonging to the United States".

The same frame of mind on the part of the officials concerned and the court below is seen in their construction of Executive Order No. 7672. "All" of section 13 was expressly listed in the order and there was no unpatented land in this section when the order was issued, yet they would read the language "all" of section 13, T. 11 S., R. 12 E. Willamette Meridian, out of the order.

The construction suggested results in absurdity. If it is correct, one section of land on a desolate sage brush butte would be open to mineral entry while the next abutting section of hard pan and sage brush would

not be because it happened to have once been patented for a homestead that had to be abandoned.

The President did not intend any such result. For example, all of section 24 in the township involved here is listed in Executive Order No. 7672. Yet the manager of the United States Land Office stated that only two forty-acre tracts therein had not been patented by 1937. R. 32, 45.

Furthermore, in issuing Executive Order No. 7672 the President acted under the powers granted by the Withdrawal Act, 43 U.S.C. secs. 141 and 142, and under that act it was mandatory that the right of mineral entry continue on the lands withdrawn.

Fundamentally, the reason for this case having arisen is the unwillingness of the officials concerned to abide by the Attorney General's opinion as to the effect of a *statutory* withdrawal order. 40 Op. A.G. 73. In that opinion he expressly states that with such a withdrawal order the right of mineral entry would continue. 40 Op. A.G. 73, 80-81. In short, if the President chooses to act under his statutory rather than his inherent powers, he acts subject to his statutory disabilities.

The preamble of the Act of May 10, 1872, 17 Stat. 91, which enacted the mining laws of the United States recites that its purpose was "to promote the Development of the Mining Resources of the United States". The mining laws "have been construed very liberally in favor of the miners". Davis, *Fifty Years of Mining Law,* 50 Har. L. Rev. 897, 900. The general policy of the

mining laws of the United States "has been to promote widespread development of mineral deposits and to afford mining opportunities to as many people as possible." *U. S. v. Ickes,* 98 F. 2d 271, 279, cert. den. 305 U.S. 619, 59 Sup. Ct. 80, 83 L. Ed. 395.

The court below has defeated the liberal intent of the mining laws of the United States by reading into the phrase "lands belonging to the United States" found in 30 U.S.C. sec. 22, distinctions which Congress did not place there. To a large extent the development of the West has been based upon a liberal construction of these mining laws.

If the government officials concerned feel that they are too broadly drawn and too generous with government-owned land, their remedy is in Congress, not in the courts. There is no ambiguity in either 30 U.S.C. sec 22, or in Executive Order No. 7672, and both require a finding that the court below was in error in holding appellant's mineral claim null and void because it was located on "acquired" land.

ARGUMENT ON SPECIFICATION OF ERROR IV

POINT: Any alleged determination of mineral character of the land prior to acquisition thereof by the United States in 1937 is immaterial.

Any determination as to mineral character made by the Department of the Interior prior to the time the United States acquired title in 1937 is ineffective. The United States bought this land for the purpose among others "of retiring submarginal land from agricultural use". R. 7. In short, the United States considered any alleged prior determination that the land was agricultural to be such a grave mistake that considerable money was spent to stop such use. R. 4-5.

Though it makes no difference now that the land was reacquired it may be noted in passing that:

> "The said Marie R. Stoller, to whom the government issued its homestead patent as aforesaid in 1915, had not at any time prior to the issuance of said patent cultivated any portion of the lands patented to her within the boundaries of said 20-acre tract known as the Luck Strike claim herein referred to." Agreed Fact VIII, R. 7.

The United States purchased the land in question so that a new start might be made in its land use. Consequently, the United States was willing to agree that it was a fact that:

> "The said mound is situated in part within the boundaries of the
>
> West Half (W ½) of the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of Section 13,

> containing 20 acres more or less and as to the said 20 acres just described, a physical examination thereof indicates that said 20-acre tract is not presently and never has been suitable for cultivation or for agricultural purposes and this is apparent because of the steep slope and because of the hard-pan lying just below the surface. Said tract has at all times herein involved been and now is chiefly valuable as mineral land because of the cinder content of said Round Butte." Agreed Fact VI, R. 6.

It would be contrary to sound public policy to hold that any alleged determination of mineral character made in 1915 should be a binding determination as to land acquired by the United States in 1937.

ARGUMENT ON SPECIFICATION OF ERROR V

POINT: There was a total absence of evidence that Executive Order No. 7908 applies to the particular land involved here.

The appellee offered no evidence showing that Excutive Order No. 7908 applies to the particular land involved here, and there is in fact a total absence of any evidence supporting this finding. Executive Order No. 7908 is an administrative order stated in general terms; and unlike Executive Order No. 7672, it does not list any land descriptions.

CONCLUSION

Both 30 U.S.C. sec. 22 and Executive Order No. 7672 authorize mineral entry on the land in question. Consequently, it follows that the court below was in error in adjudging appellant's mining claim null and void.

Respectfully submitted,

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